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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963,

No. 17

WALTER HUMPHREY, ETC., ET AL., - Petitioners,

versus

C. W. MOORE, ETC., ET AL.,
GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89,
and
DEALERS TRANSPORT COMPANY, - Respondents.

AND

No. 18

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 89, - Petitioner,

versus

C. W. MOORE, ET AL., - - - Respondents.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF KENTUCKY.

PETITION FOR REHEARING BY C. W. MOORE, ETC., ET AL.

JOHN Y. BROWN,
BROWN, SLEDD & McCANN,
601 Security Trust Building,
Lexington, Kentucky,
Attorneys for Respondents.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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Respondents, C. W. Moore, individually, and for and on behalf of members of the class, present their petition for rehearing of the above entitled cause, and, in support thereof, respectfully submit this memorandum.

GROUNDS FOR REHEARING.

The opinion of the Court deciding the issue concerning duty of fair representation by the Union fails to accurately reflect the facts, as there is sufficient evidence of failure of fair representation under the law as expressed by the Court in this opinion to sustain the Kentucky Court of Appeals.

The Court states on page 15 of its opinion:

> "Dealers employees had notice of the hearing, they were *obviously aware* that they were locked in a struggle for their jobs and seniority with the E & L drivers, and three stewards *representing* them went to the hearing at union expense and were given *every opportunity* to state their position."

The conclusion by this Court that these respondents were "obviously aware" of the struggle for their jobs is clearly erroneous. The facts show, without dispute, that the Union representatives assured these respondents (and the employees of E & L) that there was no problem. They had been consistently told there was no difficulty with their jobs until fifteen minutes before the hearing at Detroit. This fact is recognized by the Court in its opinion on page 13.

The conclusion that there was any act of "representing" by these stewards who attended the hearing is equally erroneous. There is no evidence that the three stewards had made any preparation or that they were able to adequately state their position before the

hearing. The assurances of their Union eliminated the necessity for representing themselves until the hearing.

The conclusion that they had "every opportunity" to state their position simply is not true. What opportunity did these stewards have to state a position under these facts? It is true that these unprepared individuals stepped into the conference room and made a short statement, but that cannot be considered as any opportunity of representation.

The Court seems to imply that the stewards had the duty to request a continuance. We submit that the duty to grant these respondents a fair hearing rests with their union which, under the law, has the obligation of fair representation. We further submit that if there was an obligation to obtain a continuance and permit a fair hearing that that duty rests with the union and not with the stewards who happened to accompany their union leader.

The issue here is not whether the result of the hearing would have been different (that is certainly idle speculation), but whether the union fulfilled its duty of fair representation. One fact stands out abundantly clear—these stewards did not add to the hearing any "facts or theory" and they were told up until the moment of the alleged hearing that they "had nothing to fear". If this Court wants to go on record as saying that such an admitted lack of hearing makes no difference because the outcome of the hearing might not have been different, this country and its law has progressed a long way from the concept of a fair hear-

ing as conceived by the framers of the Constitution. The Court states on page 15 of the opinion:

> "As far as this record shows, the Union took its position honestly, in good faith and without hostility or arbitrary discrimination."

If the Court can take this record and make the unequivocal statement there is no evidence of lack of good faith or arbitrary discrimination, then we submit there is no meaning to its words that a union has the duty of fairly representing its members. Certainly no union representative is going to admit it! It could only be proven by a change of position and by the circumstances. The Court takes the word of the union official and ignores these evidences of the absence of good faith.

(1) The first step, a hearing between the employer and the local union involved in the grievance as provided in Article 7 Section 2(a) of the contract, was ignored.

(2) The hearing before the local joint conference committee was "dead locked" thereby at least raising the inference and giving the opportunity of hiding from these respondents the fact that the union's reassurances to them were untrue.

(3) Repeated assurances by the local union that these respondents had nothing to worry about, that their jobs were safe and that E & L employees should be looking for other jobs, which assurances continued until a few moments before the Detroit Joint Conference Committee.

(4) Failure to disclose the above mentioned change of position until immediately prior to the Detroit hearing, although there is evidence in this record that the local union knew their national president, James Hoffa, would take a position contrary to these respondents and contrary to the position then held by Local 89 leaders. David E. Stovall, personnel and safety director for Dealers, testified that Paul Priddy knew before he left for Detroit that Hoffa was thinking that the employees of both concerns would have to be sandwiched in and that Paul Priddy had so conveyed this information to Stovall (R. 143).

(5) Failure to provide a fair, impartial or adequate hearing to these respondents before the Joint Conference Committee.

(6) The fact that the decision reached by the Joint Conference Committee is contrary to the clear intent of the contract which was and is designed to protect terminal seniority.

(7) The fact that the union was able to predict the outcome of the hearing speaks louder than any words of the conclusion we have drawn that there was no fair hearing and that the union had power in this instance to arbitrarily decide the fate of these respondents without regard to the contract or to their rights.

The Court relies upon only one case for support of its holding that there was no evidence of improper representation by the union, Ford Motor Company v. Huffman, 345 U. S. 330. That case is not authority for what has occurred in the present case. In the Huffman case, there was a negotiated supplemental

agreement which did affect the seniority benefits of certain members of the union. In the present case there is a decision made by a Conference Committee while ruling upon a grievance where there was no negotiation and, in our opinion, where there was no hearing, yet this grievance procedure radically affected the rights of a large segment of the membership of the union.

We further cannot help but believe that under these facts, the undisputed fact that the same union represented both antagonists must be given some consideration when determining the issue of fair, honest representation.

We concur with the Court that there are instances when a union represents conflicting groups of employees and there are instances when a union must insist upon a decision which will adversely affect a certain group of its members. To deny a union these rights would, as the Court states, "gag the union" and "weaken the collective bargaining and grievance processes."

By the same token, however, when a union undertakes to represent two conflicting groups, it becomes immediately the duty of the union leaders to deal openly and aboveboard with both sides and to make a full disclosure of its position at all times, and also a full disclosure of any changes in position as soon as such changes are determined by the union. A union representative would be under the same duty that a lawyer would be if an attorney undertook to represent both sides at the request of both sides. The Bar

association bans such representation, but, if it is undertaken, all dealings must be open and aboveboard. This situation did not exist in the role played by Paul Priddy and his assistant, Les Atterbury. Both of these men undertook by deceit to make the Dealers' employees feel secure until the very moment that the meeting, which was to deprive them of their jobs, was about to be called. Priddy then stated his change of position, then withdrew from the committee which was to hear the grievance, and argued the case for one of the conflicting groups.

To say that this is fair representation makes a mockery of fair representation. This Court should authorize the taking of further proof on the question of fair representation. Counsel respectfully submits to the Court that at the time this suit was filed, the decision had already been made which would deprive the Dealers' men of their jobs; that the hearing in this case and its appeal to the Court of Appeals for a temporary injunction took place within one week's time; that ninety-seven of Dealers' men had already been discharged and replaced, and that in the hurry to get the matter before the lower court and the Court of Appeals, counsel for Moore and his associates did not take full advantage of all the proof available and the issue of fair representation is not properly before this Court, due partially to the above fact and to the additional fact that adroit counsel for the Teamsters Union brought before this Court only such excerpts from the original proof as would put the Teamsters Union and Paul Priddy in the best light. This Court

should read the entire record or should allow Respondents to take further proof on this question and should set this case, as suggested by Mr. Justice Harlan, for a further hearing on the matter of union representation.

As counsel for Respondents sought to say in the oral argument before this Court, the present procedure leaves the men as puppets and pawns in the hand of the union. As an illustration of this, counsel stated in his oral argument on October 17th before this Court a so-called hypothetical case where, out in St. Louis, an old company bought out a new company. In this instance the youngest employee of the old company was older in seniority than the oldest employee of the new company. Yet Hoffa—and make no mistakes, he dominates the Truckaway Committee in Detroit—ran all the new men around the old men and these old men lost their seniority. This is not a hypothetical case. This counsel was one of the attorneys in the case. The Court refused relief to these men to preserve their contractual rights, on the ground that the state court had no jurisdiction.

Because of the importance of this case to all the working people of America, further proof should be taken on the question of fair union representation and the Court should allow respondents to argue this question again. Future management has a stake also in this Court's decision on this vital point. Young men in the future will gather around them young employees and by their energy, they will make a success of their company. But, under the ruling of this Court in this case, a giant union like the Teamsters can stifle any

acquisition of new companies because it would make the aggressive, energetic, successful employees lose their jobs to the seniority of the men whose business they had taken. This is not the philosophy on which this country became great and this Court ought not to advance a philosophy that deprives men of putting forth their best effort for fear that by their best effort they may acquire new business that in return would cause them to lose their jobs.

There must be a distinction between the duty of fair representation as it applies to a grievance procedure, as compared with the act of negotiation for an original or supplemental contract. This Court recognizes the distinctions between negotiation for a contract, termed "bargaining", and the settlement of grievances. In Elgin v. Burley, 326 U.S. 711, the Court states that bargaining looks to the acquisition of rights for the future and not to the assertion of rights claimed to have been vested in the past and it contemplates a situation where there is no existing agreement or where such an agreement is to be changed. The Court then stated that a grievance contemplates the existence of a collective bargaining agreement already concluded and the dispute relates to the application of a particular provision to a specific situation. The present opinion seems to imply there should be no distinction. There is the distinction that not only do we have involved in a grievance the determination of rights under an existing contract, but, and perhaps even more important, there is the difference in the manner of reaching the conclusion. Negotiation or bargaining is a process

which may proceed for weeks, months or even years. The union, the union members and the employers have ample opportunity to engage in just exactly the procedure intended by the words "bargain" or "negotiate", that is, an opportunity to discuss, propose, reject, accept or compromise on many issues.

The contract as negotiated in this case provided that terminal seniority should prevail. It also provided for a binding arbitration of grievances. We agree the issue of seniority could be negotiated, even during the course of the contract, but can the clear intent of the contract be virtually replaced by a grievance procedure which, in effect, "negotiates" a new contract? This fact becomes of extreme importance when the absence of a hearing by the parties affected is considered. Therefore, we have, in this instance, the vital interests of these respondents which were incorporated in a written, binding contract decided by a grievance procedure at which time there was no "negotiation" or "bargaining" and they were not even given the benefit of a hearing. Surely a distinction must be made between the duties of a union and the opportunity for fair hearing regarding a grievance procedure and negotiation.

The Court constantly refers to the decision of the Joint Conference Committee as having *"dovetailed"* the seniority lists (Opinion, pages 7 and 13, and Justice Goldberg Opinion, page 3). The decision of the Joint Conference Committee was that "(they) shall be *sandwiched* in on a master seniority board, using the

presently constituted seniority lists and the dates contained therein at Louisville, Kentucky . . ."

The effect of this decision and the meaning of the term "sandwiched in" is that the employees with longest seniority shall be employed first regardless of which company they worked for prior to the decision. By reason of this ruling, Dealers employees were generally laid off first because they had less seniority.

"Dovetailing" has a different meaning. It means taking one man from each list. This would mean that Dealers employees would have half the jobs. Under the system by which Ford allocated its business prior to E & L withdrawing, the business was divided equally between the two companies. If there were ten loads to go to Kansas City, five would be given to Dealers, five to E & L. By a dovetailing process Dealers and E & L would have shared just as they had prior to E & L's withdrawal, but by the sandwiching process E & L gets all ten loads and Dealers gets none, or practically none.

Now, as a final contention, counsel for Respondents asks the Court to again go back and read Section 5, on page 14 of the Automobile Carrier Truckaway Agreement. To avoid that necessity, I quote said section in full.

> "In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved.

Any controversy with respect to such matter shall be submitted to the joint grievance procedure (ARTICLE 7)."

The Court will note that this agreement says the employees absorbed or affected thereby. The Court should authorize the taking of proof as to just what employees were affected. Actually E & L sold out its terminal and no part of it was bought by Dealers. Actually E & L had left only secondary runs and these secondary runs gave employment only to twenty men. Actually, under this contract only twenty men were affected. Does not the Court believe proof ought to be taken on this question, instead of accepting the excerpts brought before this Court by adroit counsel for the Teamsters, in an attempt to show that all of E & L's business was taken over? In the taking of additional proof, we would take testimony from E & L as well as Dealers, as to whether any other men, except those on secondary runs, were affected by Dealers taking over these secondary runs.

If the contract is complied with, it would create no disturbance for the twenty men on the secondary runs to be absorbed on a seniority basis. But what the union actually did was to go out on the seniority list and pick up approximately two hundred men, most of whom had not worked for over a year, and run them ahead of Dealers' men who were working and had been working because, by their efficiency, they had taken away the business in the Louisville locality from E & L. To cause these men to lose their employment because of

their efficiency is a travesty on justice and should not receive the approval of this Court.

Men should have a right to believe that when they have a contract, they are protected by the terms of that contract. There is no conceivable way to construe this contract in the manner in which the Truckaway Committee in Detroit interpreted it. Their interpretation is a plain violation of Paragraph 2, page 17 of the Truckaway Agreement dealing with closed terminals. Indeed their order even says that because of the closing of the E & L terminal that the order is made. The method and manner of handling employees on the closing of the terminal is covered by the contract and should be a contract right upon which the men could rely.

Respondents respectfully request the Court to broaden their opinion to authorize the Court of Appeals of Kentucky to hear further proof upon the question of fair union representation and upon the question of whether or not there was an absorption or merger between Dealers and E & L and that full proof could then be before the Court in another argument on the question of fair union representation and the further question of the meaning of employees absorbed or affected.

It is the position of Respondents that since E & L had already withdrawn from the field, that only the employees of secondary runs were affected and only those employees should be dovetailed into the Dealer employee list.

Had the first step in the contract been followed—that is, a conference between Dealers employees and Dealers management—undoubtedly this would have been done, but the union, having already decided on making itself supreme with a lateral seniority precedent in the industry, deceived the Dealers employees by skipping the first step and then by depriving them of a fair hearing by deceit until the very moment the hearing was held in Detroit. It is our position that a fair hearing might well have prevented the travesty on justice that has occurred.

We respectfully submit that the Respondents did not have fair representation; that they were deceived and that this Court did not have a full disclosure of the evidence in the record as to the dealings which the union representatives had with Dealers and E & L prior to the Detroit meeting and that further proof should be allowed on union representation and on what employees are affected.

CONCLUSION.

For the foregoing reasons, these Respondents urge that this Petition for Rehearing be granted; that the judgment of the Kentucky Court of Appeals be affirmed or, in the alternative, that the Kentucky Court of Appeals be directed to allow the Respondents to take further proof on the questions above set out, and that this Court allow another argument, as suggested by Mr. Justice Harlan on the question of fair union representation.

Respectfully submitted,

JOHN Y. BROWN,
BROWN, SLEDD & MCCANN,
601 Security Trust Building,
Lexington, Kentucky,
Attorneys for Respondents.

CERTIFICATE OF COUNSEL.

I, John Y. Brown, counsel for the Respondents, C. W. Moore, individually and for and on behalf of members of the class, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

JOHN Y. BROWN

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CERTIFICATE OF SERVICE.

This is to certify that a true copy of the within Petition for Rehearing was this ____ day of February, 1964, served by mailing copies as follows: Mr. H. Solomon Horen, Kentucky Home Life Building, Louisville, Kentucky; Mr. William S. Zeman, 1 Grand Street, Hartford, Connecticut; Mr. Mozart G. Ratner, 1411 K Street, N. W., Washington, D. C.; Mr. David Previant, 511 Warner Building, Milwaukee 3, Wisconsin; Messrs. Herbert S. Thatcher and David S. Barr, 1009 Tower Building, Washington 5. D. C.;

Mr. Ralph H. Logan, 506 West Jefferson Street, Louisville, Kentucky; and Hughett, Hughett & Hughett, 314 Armory Place, Louisville, Kentucky, attorneys for Petitioners; and Mr. Newell N. Fowler, 44 North Second Street, Memphis, Tennessee, attorney for Respondent, Dealers Transport Company.

BROWN, SHEDD & MCCANN,

By John G. Brown

Attorneys for Respondents,
C. W. Moore, Etc., Et Al.